IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, and

ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency,

Defendants.

Civil Action No. 19-cv-2181-TJK

PLAINTIFF'S RESPONSE TO DEFENDANTS' PARTIAL OBJECTION TO NOTICE OF RELATED CASES

On September 23, 2019, Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") designated this case as related to two cases pending before Judge Ketanji Brown Jackson: *Center for Biological Diversity v. EPA*, No. 19-688 (D.D.C.) ("*CBD I*"), and *Center for Biological Diversity v. EPA*, No. 19-2198 (D.D.C.) ("*CBD II*"). *See* ECF No. 6. CREW's related-case designation was based partly on CBD's prior designation of *CBD I* and *II* as related. Per the Local Rules, both *CBD* cases must remain assigned to Judge Brown Jackson unless and until *she* rejects CBD's related-case designation. *See* Local Civ. R. 40.5(c)(3).

Now, Defendants U.S. Environmental Protection Agency and Andrew Wheeler (collectively "EPA") partially object to CREW's related-case designation, asserting that this case is related to *CBD II* but not *CBD I*, that the two *CBD* cases are not related, and that *CBD II* should thus "be reassigned" from Judge Brown Jackson "to this Court." EPA Obj. at 1-4, ECF No. 9. But EPA calls on this Court to resolve issues that Local Civil Rule 40.5 reserves for

Judge Brown Jackson—*i.e.*, whether *CBD I* and *CBD II* are related. And that question, in turn, informs whether this case is properly designated as related to both *CBD* cases.

In accordance with the Local Rules and interests of judicial efficiency and economy, this Court should hold EPA's objection in abeyance pending a decision by Judge Brown Jackson on any related-case objection in *CBD II*. Alternatively, if the Court were to reach the merits of EPA's objection, it should be overruled because this case and the *CBD* cases "involve common issues of fact" and "grow out of the same event or transaction." Local Civ. R. 40.5(a)(3).

BACKGROUND

The current dispute involves three pending cases: *CBD I*, *CBD II*, and this case. *CBD I*, filed March 12, 2019, is a suit under the Freedom of Information Act ("FOIA") and the Administrative Procedure Act ("APA"). CBD challenges both EPA's handling of CBD's pending FOIA requests, *CBD I* Compl. ¶¶ 58-81, 93-107, ECF No. 1, and, pertinent here, EPA's ongoing "pattern, practice, and/or policy of violating FOIA's procedural requirements when processing FOIA requests by intentionally refusing to [timely] issue a lawful determination, produce responsive records, and/or respond in any meaningful manner" to FOIA requests, *id.* ¶¶ 82-92. CBD claims it is harmed by this unlawful pattern, practice, or policy because it has "resulted, and will continue to result, in the untimely access to information to which [CBD] is entitled." *Id.* ¶ 85.

CBD II, filed July 24, 2019, likewise asserts FOIA and APA claims against EPA, this time challenging the agency's failure to follow rulemaking procedures in adopting internal FOIA directives and a June 2019 final rule amending the agency's FOIA regulations (the "FOIA Rule" or "2019 FOIA Rule"). *See CBD II* Compl. ¶¶ 79-122, ECF No. 1. The *CBD II* complaint repeatedly invokes the FOIA requests and claims at issue in *CBD I*, alleging that "EPA's

significant delay in responding to [CBD's] FOIA requests at issue in [*CBD I*] is a direct result of EPA's [unlawful] implementation of . . . internal written and oral directives and its FOIA Rule," and that "EPA has committed and continues to implement unlawful pattern, policy/policies, and/or practice(s) of delaying production of records and even preventing the public release of records altogether." *Id.* ¶ 8; *see also id.* ¶¶ 55-66. The *CBD II* complaint ties policies codified in the 2019 FOIA Rule—particularly the Rule's authorization of political appointees to issue final FOIA determinations—to EPA's ongoing pattern, policy, or practice of unreasonable delay, which the agency began implementing in 2017. *See id.* ¶¶ 2-4, 6, 8, 45, 47. Like *CBD I*, *CBD II* alleges that this pattern, policy, or practice harms CBD by depriving it of timely access to records to which it is entitled under FOIA. *See id.* ¶¶ 53, 65-66, 116-17, 121.

On July 26, 2019, CBD filed a notice of related case in *CBD II*, designating it as related to *CBD I*. *See CBD II*, ECF No. 2. EPA's objection to that notice, if any, is due October 28, 2019. *See* Local Civ. R. 40.5(b)(2); *CBD II* Sept. 24, 2019 Minute Order.[1]

This case, filed on July 23, 2019 and amended on August 15, 2019, challenges EPA's 2019 FOIA Rule under the APA and FOIA as both procedurally and substantively defective. Specifically, CREW alleges that EPA adopted the rule in violation of the APA's rulemaking procedures, that the rule is arbitrary and capricious and contrary to law, and that it is an unlawful FOIA policy or practice. *See* Compl. ¶¶ 46-59, ECF No. 1; First. Am. Compl. ¶¶ 48-62 ("FAC"), ECF No. 5. Echoing the *CBD* cases, CREW ties the 2019 FOIA Rule to an overall pattern of unreasonable delay in FOIA administration at the agency that began in 2017—particularly delay associated with "political-appointee" review—which harms CREW by

[1] EPA's partial objection in this case reveals that it is virtually certain to object to the related-case designation in *CBD II*.

depriving it of "lawful and timely access to records under FOIA." *See* Compl. ¶¶ 20-26, 32, 43-45; FAC ¶¶ 20-26, 32, 43-47.

On September 23, 2019, CREW and CBD filed notices in all three cases designating them as related. *See* ECF No. 6; *CBD I*, ECF No. 14; *CBD II*, ECF No. 9. On October 2, 2019, EPA partially objected to CREW's related-case designation, asserting that "this case is related to *CBD II*" but "not . . . *CBD I*," disputing that the two *CBD* cases are related, and requesting that *CBD II* "be reassigned to this Court." EPA Obj. at 1-4.

ARGUMENT

"Generally, all new cases filed in this courthouse are randomly assigned." *Singh v. McConville*, 187 F. Supp. 3d 152, 154 (D.D.C. 2016) (citing Local Civ. R. 40.3(a)). "The local rules contain an exception, however, in the interest of judicial economy, for 'related cases.'" *Id.* at 155. Local Rule 40.5 "provides that when a new case is 'related' to a case pending before a judge in this district, the new case is assigned to the judge to whom the pending related case has been assigned." *Autumn Journey Hospice, Inc. v. Sebelius*, 753 F. Supp. 2d 135, 139 (D.D.C. 2010) (citing Local Civ. R. 40.5(c)). "Civil . . . cases are deemed related when the earliest is still pending on the merits in the District Court and they (i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event or transaction or (iv) involve the validity or infringement of the same patent." Local Civ. R. 40.5(a)(3).

When a party objects to a related-case designation, "the matter *shall be determined by the judge to whom the case is assigned*." Local Civ. R. 40.5(c)(3) (emphasis added). If that judge "determines that the cases in question are not related, the judge may transfer the new case to the Calendar and Case Management Committee," and the Committee either "shall cause the case to

be reassigned at random," or "may return the case to the transferring judge," depending on whether it finds good cause for transfer. Local Civ. R. 40.5(c)(1)-(2).

I. The Court Should Hold EPA's Objection in Abeyance Pending a Ruling by Judge Brown Jackson on Any Related-Case Objection in *CBD II*

At the time of CREW's related-case designation, the *CBD* cases had already been designated as related and, accordingly, assigned to the same judge: Judge Brown Jackson. Under Local Rule 40.5(c)(3), both *CBD* cases must remain assigned to Judge Brown Jackson unless and until *she* rejects CBD's related-case designation. The *CBD* cases are, in other words, inseparable absent a contrary ruling by Judge Brown Jackson. Due in part to this fact, CREW designated this case as related to both *CBD* cases, a decision to which EPA now objects.[2]

This raises a question not squarely addressed in the Local Rules—namely, what is the proper procedure for resolving an objection to a related-case designation that depends, at least in part, on a prior related-case designation that remains in effect? Local Rule 40.5(c)(3) and principles of sound administration indicate that the judge assigned to the earlier-designated related cases (here, Judge Brown Jackson) must be given an opportunity to determine the relatedness of those cases *before* the judge assigned to the later-designated case (this Court) rules on the objection. That is true for two reasons.

First, a contrary rule would impede the first court's authority, under Local Rule 40.5(c)(3), to resolve related-case objections concerning cases pending before it. The present dispute illustrates the point. EPA submits argument to this Court on why the two *CBD* cases are purportedly not related, and urges that "*CBD II* . . . be reassigned to this Court." EPA Obj. at 1-

[2] As explained *infra* Part II, CREW's related-case designation was not based solely on the relatedness of *CBD I* and *II*; it is separately justified because this case and the *CBD* cases "involve common issues of fact" and "grow out of the same event or transaction." Local Civ. R. 40.5(a)(3).

4. But this Court lacks authority to rule on the propriety of CBD's related-case designation in a case pending before another judge, nor may it direct that *CBD II* be transferred to it. Rather, Local Rule 40.5 requires that both *CBD* cases remain with Judge Brown Jackson unless and until *she* rules otherwise. EPA's request would require the *CBD* cases to be split apart without allowing Judge Brown Jackson to weigh in on the matter, contrary to the text and spirit of the rule.

Second, awaiting a decision by Judge Brown Jackson would avoid potentially conflicting rulings and conserve judicial resources. *See Singh*, 187 F. Supp. 3d at 155 (related-case rule is designed to promote "judicial economy"). Assume that this Court were to deem this case related to *CBD II* but not *CBD I*, and that Judge Brown Jackson were to deem the two *CBD* cases related. This Court's ruling would require that *CBD II* be transferred to it, while Judge Brown Jackson's ruling would require that she keep both *CBD* cases. Presumably, the Court's Calendar and Case Management Committee would then need to resolve the conflict, needlessly draining judicial resources and delaying resolution of both cases. This could be avoided by simply awaiting a decision by Judge Brown Jackson on the relatedness of the *CBD* cases. If she rejects relatedness, this Court may proceed to assess whether this case is related to the *CBD* cases without fear of conflicting rulings. By contrast, if she finds relatedness, both *CBD* cases must remain with her, which would, in turn, be a critical factor in resolving EPA's objection here. The prudent course, then, is to await a decision by Judge Brown Jackson.[3]

[3] While awaiting the decision, this case may otherwise proceed in the ordinary course, including summary judgment briefing by the parties. This would ensure that proceedings are not unnecessarily delayed pending resolution of the relatedness issue.

II. Alternatively, the Court Should Overrule EPA's Objection Because this Case is Related to Both *CBD* Cases

Were this Court to reach the merits of EPA's objection, it should be overruled because CREW's related-case designation was proper. For starters, EPA concedes that this case and *CBD II* are related, *see* EPA Obj. at 1, as both cases challenge EPA's 2019 FOIA Rule and thus "involve common issues of fact," and "grow out of the same event or transaction," Local Civ. R. 40.5(a)(3). EPA insists, however, that this case and *CBD I* are not related because *CBD I* does not challenge the 2019 FOIA Rule and, in its view, is merely a "garden-variety FOIA action." EPA Obj. at 3-4. EPA is wrong.

EPA overlooks a key factual commonality between this case and both *CBD* cases—all three cases implicate the same ongoing pattern, policy, or practice of unreasonable delay in FOIA administration that EPA began implementing in 2017. Indeed, this issue is part of the factual predicate both for the plaintiffs' claims and their Article III standing. *See CBD I* Compl. ¶¶ 82-92, ECF No. 1 (asserting FOIA claim challenging EPA's "pattern, practice, and/or policy of violating FOIA's procedural requirements when processing FOIA requests by intentionally refusing to [timely] issue a lawful determination, produce responsive records, and/or respond in any meaningful manner," which injures CBD by depriving it of "[]timely access to information to which [CBD] is entitled" under FOIA); *CBD II* Compl. ¶¶ 2-4, 6, 8, 45, 47, 53, 55-66, 116-17, 121, ECF No. 1 (tying 2019 FOIA Rule to the same "unlawful pattern, policy/policies, and/or practice(s) of delaying production of records and even preventing the public release of records altogether" challenged in *CBD I*, which injures CBD by depriving of timely access to records to which it is entitled under FOIA); Compl. ¶¶ 20-26, 32, 43-45; FAC ¶¶ 20-26, 32, 43-47 (tying 2019 FOIA Rule to ongoing pattern of delay in FOIA administration at the agency, which injures CREW by depriving it of "lawful and timely access to records under FOIA").

Contrary to EPA's assertions, it does not matter that this case and *CBD I* assert different *legal* claims, because the relevant question is whether the cases "involve common issues of *fact*." Local Rule 40.5(a)(3) (emphasis added). As outlined above, this case and *CBD I* do indeed implicate common factual issues as to the existence of an ongoing pattern, policy, or practice of unreasonable delay in FOIA administration at EPA. Even if those issues do not bear on the merits of both plaintiffs' claims, they are at least relevant to Article III standing in both cases. *See Muckrock, LLC v. CIA*, 300 F. Supp. 3d 108, 134–35 (D.D.C. 2018) (serial FOIA requester sufficiently pleaded injury-in-fact by alleging "unreasonable delay" resulting from "application of an unlawful policy or practice during the [agency's] processing of FOIA requests"). That is enough to deem the cases related. *See Singh*, 187 F. Supp. 3d at 155 (finding relatedness based on "common issues of fact in the two cases related to the defendants' policies and actions").

Accordingly, this case is related to both *CBD* cases within the meaning of Local Rule 40.5, and it is in the interest of judicial economy for a single judge to handle all three cases. Because *CBD I* is the earliest filed of the cases, this case should be transferred to the Calendar and Case Management Committee for reassignment to Judge Brown Jackson. *See* Local Civ. R. 40.5(a)(3).

CONCLUSION

EPA's partial objection to CREW's related-case designation should be held in abeyance pending a ruling by Judge Brown Jackson on any related-case objection in *CBD II*. Alternatively, EPA's partial objection should be overruled.

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Respectfully Submitted,

/s/ Nikhel Sus
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